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80-2073

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILMA D. STEWART, *Petitioner*

v.

MINNESOTA MINING AND MANUFACTURING COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS R. NEEDHAM
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June 1, 1981

QUESTIONS PRESENTED

1. Whether disposition by Summary Judgment is appropriate on the issues of negligence and strict liability where Defendant's motion is based on the alleged contributory negligence of Plaintiff or the alleged negligence of a third party.

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WILMA D. STEWART, *Petitioner*

v.

MINNESOTA MINING AND MANUFACTURING COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner Wilma D. Stewart respectfully prays that a Writ of Certiorari Issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 4, 1981.

OPINION BELOW

The Judgment and Order on Petition for Rehearing rendered by the United States Court of Appeals for the Fifth Circuit appear in the Appendix hereto. No opinion was rendered by the United States Court of Appeals for the Fifth Circuit. The Order, Judgment and Opinion rendered by the District Court for the Northern District of Texas appear in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals of the Fifth Circuit was entered on February 4, 1981. A timely petition for rehearing was denied on March 6, 1981, and this petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

This action is founded upon the theories of strict liability and common law negligence. The Plaintiff in the proceedings below, and the Petitioner herein, was injured while attempting to negotiate a left hand turn. Petitioner, who was executing a left hand turn from an east-bound direction to a north-bound direction, was struck broadside by a vehicle traveling west-bound. As a result of the foregoing occurrence, Petitioner brought suit against Respondent. It is Petitioner's position that the traffic control signal in operation at the intersection where the collision in question occurred was responsible for the collision and resulting damages to Petitioner. The traffic control signal in question was designed, manufactured and distributed by Respondent.

Petitioner contends that the traffic control signal in question is designed in such a manner that the red, yellow and green lights can only be seen by motorists who are at a certain distance and at a certain degree of angle from the traffic control signal. As a motorist approaches the traffic control signal, the color signals appear to be "on" or "off" depending on her distance and degree of angle to the placement of the traffic control signal. As Petitioner approached the traffic control signal, she was unable to discern whether it was displaying a red, yellow or green signal. Petitioner, understandably confused and already in the intersection, attempted to complete her left turn and

the collision occurred. The traffic control signal in question failed to provide sufficient visual directives to properly control the flow of traffic at the intersection in question and as such was unreasonably dangerous.

The Respondent contends in its Motion For Summary Judgment that Petitioner's alleged contributory negligence, or the alleged negligence of some third party, should relieve Respondent of any liability for having placed a defectively designed and unreasonably dangerous traffic signal in the stream of commerce, which acts were both the proximate and producing cause of damages to Plaintiff.

The District Court granted Respondent's Motion For Summary Judgment. The Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of the same Court of Appeals and the Texas Supreme Court as to the effect of contributory negligence of Petitioner or negligence of a third party which allegedly contributed to the occurrence.

Respondent contends in its motion that even if all facts stated by Petitioner were true, Respondent should nevertheless escape liability because of Petitioner's own contributory negligence or the negligence of some third party.

Prior decisions by the Texas Supreme Court and by the United States Court of Appeals for the Fifth Circuit have clearly held that Contributory Negligence of a Plaintiff does not constitute any defense whatsoever to a cause of action founded upon strict liability. *Henderson vs. Ford Motor Company,* 519 S.W.2d 87 (Tex. 1974); *Mitchell vs. Fruehauf,* 519 F.2d 1139 (5th Cir. 1978). The Texas Su-

preme Court has held that the negligent action of a third party which is a proximate cause of Plaintiff's injuries does not constitute a defense to Plaintiff's cause of action founded upon strict liability, but rather the third party becomes a joint tort-feasor whose actions are a concurring cause, and thus entitles the Defendant to seek contribution or indemnity from the third party. *General Motors vs. Simmons,* 588 S.W.2d 855 (Tex. 1977).

With respect to the negligent cause of action asserted against Respondent, any negligent conduct of Petitioner or of a third party which proximately contributed to Petitioner's injuries could reduce Petitioner's damages, but only under certain factual proof could it be an absolute bar. Section 2212A, Tex. Rev. Civ. Stat.

The decision of the District Court for the Northern District of Texas in granting Respondent's Motion For Summary Judgment on the above stated grounds and the decision of the Court of Civil Appeals for the Fifth Circuit in affirming the lower courts decision directly conflicts with the prior decisions of the same Court of Appeals and the Texas Supreme Court as above set forth.

2. The decision below conflicts with the decisions of other Courts of Appeals as to the propriety of granting summary judgments in tort actions.

The District Court for the Northern District of Texas found that "... either she [Petitioner] or Paul Strong [Third Party], or both, were at fault ... and Defendant's Motion For Summary Judgment must be granted." To make this finding it was necessary for the District Court to determine that the traffic control signal was not defectively designed *and* that the Respondent was not negligent in so designing the traffic signal; or, that the negligent acts of Respondent in so designing the defective traffic sig-

nal were not a proximate cause of Petitioner's damages *and* that the defective signal was not a producing cause of Petitioner's damages. In so doing, the District Court would by necessity have to access probative value to the evidence in this case.

The United States Court of Appeals for the Eighth Circuit stated:

> If the trial judge discovers a factual issue, he may attempt to resolve the dispute. . . . The District Court must deny the Motion For Summary Judgment after finding a genuine factual dispute even if it is convinced that the party opposing the Motion is unlikely to prevail at trial. . . . Even in cases where the judges are of the opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a Motion For Summary Judgment, which was never intended to enable parties to evade jury trials or to have the Judge weigh the evidence in advance of it being presented. *Hughes vs. American Jawa, LTD.*, 529 F.2d 21, 25 (8th Cir. 1976).

Several genuine issues of material fact exist as to Respondent's liability under both common law negligence and strict liability. First, whether or not the traffic control signal was defectively designed. Second, whether the traffic control signal was unreasonably dangerous. Third, whether Respondent's actions in designing and placing such signal in the stream of commerce constituted negligence. Fourth, whether Petitioner's actions constituted negligence, and, if so, what percent. Fifth, whether the third party's actions constituted negligence, and if so, what percent.

The District Court's action in resolving these factual issues and granting Summary Judgment, and the decision of the United States Court of Appeals for the Fifth Circuit

in affirming the lower courts decision, conflicts with the decision of the Eighth Circuit Court of Appeals set forth above.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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COUNSEL FOR PETITIONER

APPENDIX

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Judgment of the Court of Appeals A1

Order on Petition for Rehearing of Court of Appeals A2

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-2207
Summary Calendar

WILMA D. STEWART,
Plaintiff-Appellant,

versus

MICHAEL PAUL STRONG, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(FEBRUARY 4, 1981)

Before GEE, RUBIN, and RANDALL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-2207

WILMA D. STEWART,
Plaintiff-Appellant,
versus
MICHAEL PAUL STRONG, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(March 6, 1981)

Before GEE, RUBIN, and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

(s) _____
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILMA D. STEWART	)	
	)	
vs.	)	*CIVIL ACTION*
	)	*NO. CA3-79-1561-C*
MINNESOTA MINING AND MANUFACTURING COMPANY	)	

ORDER GRANTING DEFENDANT MINNESOTA MINING AND MANUFACTURING COMPANY'S MOTION FOR SUMMARY JUDGMENT

On this day came on to be considered Defendant Minnesota Mining and Manufacturing Company's Motion for Summary Judgment, and the Court, having considered the pleadings, the affidavits, the Plaintiff's deposition, and the briefs of the parties, is of the opinion and finds that there are no factual issues to be tried, and that Defendant Minnesota Mining and Manufacturing Company's Motion for Summary Judgment should be granted.

It is so ORDERED.

SIGNED this 6th day of October, 1980.

(s)
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILMA D. STEWART	)	
	)	
vs.	)	*CIVIL ACTION*
	)	*NO. CA3-79-1561-C*
MINNESOTA MINING AND MANUFACTURING COMPANY	)	

FINAL JUDGMENT

On this day came to be heard the above-entitled and numbered cause, and the Court, having previously granted Defendant Minnesota Mining and Manufacturing Company's Motion for Summary Judgment is of the opinion and finds that Plaintiff Wilma D. Stewart should have and recover nothing of and from Defendant Minnesota Mining and Manufacturing Company, and that costs of suit should be taxed against the Plaintiff.

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff Wilma D. Stewart have and recover nothing of and from Defendant Minnesota Mining and Manufacturing Company, and that costs of suit be taxed and they hereby are taxed against the Plaintiff.

SIGNED this 6th day of OCTOBER, 1980.

(s)
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS 75242

W. M. TAYLOR, JR.
U. S. DISTRICT JUDGE

September 30, 1980

Mr. Thomas R. Needham
12700 Hillcrest, #155
Dallas, Texas 75230

Mr. Luke Ashley
2300 Republic National Bank Bldg.
Dallas, Texas 75201

Re: Wilma D. Stewart vs. Minnesota Mining and Manufacturing Company
CA 3-79-1561-C

Gentlemen:

I have carefully considered defendant's motion for summary judgment, the briefs of the parties, and plaintiff's deposition. I find that her testimony clearly establishes that either she or Paul Strong, or both, were at fault to the exclusion of any fault on the part of defendant. Therefore, I conclude that there are no factual issues to be tried and defendant's motion for summary judgment must be granted.

Counsel for defendant is requested to furnish an appropriate form of order.

Yours very truly,

(s)
W. M. Taylor, Jr.